Filed 8/28/19 PhxCap II, LLC v. AG Mobile Restaurant Concepts, LLC CA4/1

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

PHXCAP II, LLC, Plaintiff and Appellant, v. AG MOBILE RESTAURANT CONCEPTS, LLC et al., Defendants and Respondents.	D073914 (Super. Ct. No. 37-2017-00027948-CL-UD-CTL)

APPEAL from a judgment and a postjudgment order of the Superior Court of San Diego County, Timothy B. Taylor, Judge. Judgment reversed and remanded with directions; postjudgment order reversed.

Law Offices of Mary A. Lehman, Mary A. Lehman; Karcher Harmes and Kathryn E. Karcher for Plaintiff and Appellant.

Burkhardt & Larson and Philip Burkhardt for Defendants and Respondents.

This is an appeal from a judgment and a postjudgment order in favor of a tenant in an unlawful detainer lawsuit brought by the landlord following a three-day notice to the tenant to pay rent or surrender possession of the leased commercial premises.

As a general rule, a commercial tenant is required as a matter of law to pay rent as of the date " 'there is no impediment to the tenant's taking possession or if the tenant is given a legal right of entry and enjoyment during the term.' " (*Reynolds v. McEwen* (1952) 111 Cal.App.2d 540, 543 (*Reynolds*); see *Samuels v. Ottinger* (1915) 169 Cal. 209, 211 (*Samuels*) ["mere occupancy" triggers the rent obligation].) In this case, the general rule was not applied because the lease provides that the tenant was not obligated to pay rent until the landlord "delivers possession of the Premises." However, the lease does not define what the landlord was required to do to effect "deliver[y of] possession of the Premises." Because of this ambiguity, the trial court denied Landlord's motion for summary judgment and postjudgment motion for judgment notwithstanding the verdict and, at trial, allowed the jury to hear extrinsic evidence on the meaning of language in paragraph 3.3 of the parties' lease entitled "Delay In Possession." Consistent with the extrinsic evidence from the tenant and the tenant's expert (based on custom and usage in the commercial real estate leasing business), the jury answered "No" to the question, "Did [the landlord] deliver possession of the Premises to [the tenant]?"

This was error; because the extrinsic evidence before the court was not conflicting, the trial court should have interpreted the lease as a matter of law. In our de novo review, we will do so. As we explain, the only reasonable and commonsense interpretation is that once the tenant was given keys and provided access to the premises in a condition

required under the express terms of the lease ("broom clean"), the landlord delivered possession of the premises to the tenant—contrary to the jury's finding—for purposes of the tenant's obligation to pay rent under paragraph 3.3.

Accordingly, we will reverse the judgment and remand for further proceedings.

I. FACTUAL AND PROCEDURAL BACKGROUND

The dispute in the case involves a commercial lease of approximately 1,700 square feet of retail space in three suites of a 5,000 square-foot strip mall on Garnet Avenue in San Diego (Premises). The parties to this appeal include: (1) the landlord, PhxCap II, LLC (Landlord); and (2) the tenant, AG Mobile Restaurant Concepts, LLC (Tenant or AG Mobile), and the guarantor of the lease, Alex Gould (Gould). The following facts, presented in a light most favorable to the judgment, are taken from the evidence received at trial.

A. *Pending Motions and Application*

In their appellate briefs, Landlord tells us that Tenant vacated the Premises after the appeal was filed, and Tenant tells us the circumstances under which Tenant vacated the Premises. Neither statement contains a citation to the record on appeal as required by California Rules of Court, rule 8.204(a)(1)(C).

Absent an accurate record reference or our independent verification, we have not considered any brief's statement regarding the facts. (*Rybolt v. Riley* (2018) 20 Cal.App.5th 864, 868 [appellate courts may " 'disregard any factual contention not supported by a proper citation to the record' "]; *County of Riverside v. Workers' Comp.*

Appeals Bd. (2017) 10 Cal.App.5th 119, 124 [appellate courts " 'ignore' " factual statements without record references].)

Tenant suggests that Landlord's first amended complaint in San Diego Superior Court case No. 37-2018-00043877-CL-UD-CTL will provide support for its statement (regarding the circumstances under which Tenant vacated the Premises) and, on this basis, asks that we take judicial notice of that document. However, consistent with the general rule that "[r]eviewing courts generally do not take judicial notice of evidence not presented to the trial court," in this appeal we " 'will consider only matters which were part of the record at the time the judgment was entered.' " (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3.) Thus, Tenant's motion for judicial notice is denied. In reaching this decision, we did consider—and therefore grant Tenant's application to file—Tenant's reply to Landlord's opposition to Tenant's motion.

Having now disregarded both Landlord's and Tenant's unsupported statements regarding Tenant's postjudgment vacation of the Premises, we deny as moot Landlord's motion to strike portions of Respondent's Brief.

B. *September 2016: Landlord Leases the Premises to Tenant*

Landlord and Tenant entered into a written lease for the Premises on or about September 2, 2016. Trial exhibit No. 1 is 24 pages, is identified on the court's Exhibit List as "September 2, 2016 Lease," and was identified by Landlord's representative as the lease for the Premises and Gould's guaranty of the lease.

The first 17 pages of trial exhibit No. 1 are a written agreement dated September 2, 2016, between Landlord and Tenant for the lease of the Premises. The

parties used a multi-page form entitled, "AIR Commercial Real Estate Association [¶] Standard Industrial/Commercial Multi-Tenant Lease - Net" (Lease). The Lease contains 49 preprinted numbered paragraphs—with typewritten information added on the first page (¶ 1, entitled "Basic Provisions") and last page (identities of parties and signatories)—and the signatures of Landlord's and Tenant's representatives on the last page. The following documents are attached and constitute a part of the Lease: a two-page "Addendum," consisting of paragraphs numbered 50 through 64; a one-page "Exhibit A," consisting of a site plan of the Premises; a two-page "Exhibit B - Landlord's Work," consisting of a list of improvements Landlord agreed to complete; a one-page "Guaranty of Lease" by "Alex Gould"; and a one-page "Rules and Regulations for Standard Retail/Office Lease."

The basic terms of the Lease include:[1] an Original Term of 10 years with a Commencement Date of April 1, 2017, and an Expiration Date of March 31, 2027; Base Rent of $6,602.70, payable on the first of each month commencing April 1, 2017; Tenant responsibility for Lessee's Share, which the Lease defines as a specified percentage of the Common Area Operating Expenses; Tenant's payment of $35,434.49, comprised of one month's Base Rent, a security deposit, and prepaid Base Rent for months 12, 18, and 20; and Tenant's use of the Premises as "a quick service walk[-]up restaurant selling

1 In this paragraph, words or terms with initial capitalization and not defined in this opinion are defined in the Lease.

hamburgers, drinks, and appetizers; as well as gourmet donuts, candy and various desert options."

The two-page Addendum contains a preprinted statement (to the effect that, in the event of any conflict between terms in the typed Addendum and the preprinted Lease, the Addendum controls) and 15 typed paragraphs numbered 50-64. Among other term, the Addendum provides that Landlord will "provide the Premises with adequate utilities required for Tenant's permitted use" (Lease, ¶ 53) and sets forth a schedule of the monthly Base Rent for each of the 10 years of the Lease (Lease, ¶ 55).

Following the Addendum are exhibits A and B. The first page of the Lease describes the Premises as "outlined on Exhibit A"; and exhibit A is one page, entitled "Exhibit A - 1,693 RSF," and contains what appears to be a site plan. Exhibit B is two pages, entitled "Exhibit B - Landlord's Work," and contains 11 numbered paragraphs—10 of which follow the statement "LANDLORD AGREES to complete the following at the Lease Premises ('**Landlord's Work**')" (Landlord's Work). Exhibit B is not mentioned elsewhere on trial exhibit No. 1, though no one contends that it is not part of the Lease.[2]

The next page of trial exhibit No. 1 is a one-page preprinted form entitled "AIR Commercial Real Estate Association Guaranty of Lease" (Guaranty). It is undated, signed by Gould, and contains typewritten inserts that identify the landlord, the tenant,

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[2] Indeed, in support of its summary judgment motion in the trial court, Landlord described the Lease, concluding with the statement: "Attached as Exhibit 'B' to the Lease is a list of improvements the Landlord agreed to furnish for the Tenant."

the lease, and Gould as the guarantor of the Lease. In principal part, by the Guaranty, Gould guarantees both the "prompt payment" by Tenant of all amounts payable by Tenant under the Lease and the "prompt performance" by Tenant of all obligations of Tenant under the Lease.

The final page of trial exhibit No. 1 is a one-page preprinted form entitled "Rules and Regulations for Standard Retail/Office Lease." At the top, it contains the date of September 2, 2016, and identifies Landlord and Tenant. Below, it contains 23 numbered paragraphs of "General Rules" (with blanks not filled in) and 12 numbered paragraphs of "Parking Rules."

Landlord first gave Tenant keys and access to the building in or around November 2016, which was within a few months of executing the Lease (Sept. 2, 2016) and approximately five months before the Commencement Date (Apr. 1, 2017). At that time, the building was a gutted shell with no walls or tenants, which Landlord's representative described as "broom cleaned" and "prepared for the tenants to come in and do their tenant improvements."

C. *January 2017: The Parties Amend the Lease*

By written agreement effective January 24, 2017, Landlord and Tenant entered into a First Amendment to Lease (Amendment), by which the parties amended the Lease in a number of areas. In addition to other terms not implicated in this appeal, the parties

agreed: to extend the Expiration Date "to May 1, 2017 - April 30, 2027";[3] to change the Premises in the Lease to a different portion of the building (i.e., from the back to the front of the strip mall "for better exposure"); to include certain outdoor patio space as a part of the Premises; and to increase accordingly the monthly Base Rent in each of the 10 years of the Lease (e.g., from $6,602.70 to $7,705 in the first year).

At or about the time the parties signed the Amendment in January 2017, Landlord placed a lockbox on the door to the Premises for the convenience of Landlord, Tenant, and both parties' contractors. Tenant acknowledges that, at least as of this date, Tenant had "access" to the Premises.

D. *January - October 2017: As the Improvements Proceed, So Do the Parties' Disputes*

Tenant did not receive its initial building permits until May 1, 2017. The City of San Diego did not issue Tenant a certificate of occupancy until mid-October 2017, and Tenant opened for business the following week.

Much of the factual presentation at trial and in the parties' appellate briefs focuses on the construction and improvements to the Premises, which were to be developed from a shell without walls to a quick service walk up restaurant selling appetizers, hamburgers, gourmet donuts, candy, deserts, and beverages. From the very beginning, the parties did

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3 The language of the Amendment refers only to the *Expiration Date*. In their appellate briefing, Landlord tells us that this means that the *Commencement Date* of the Lease was changed to May 1, 2017 (from Apr. 1, 2017), and Tenant tells us that this means the *Original Term* of the Lease became May 1, 2017, through April 30, 2027. At trial, Landlord's representative and Tenant's representative each testified that the Lease Commencement Date changed to May 1, 2017.

not agree on who would obtain which permits, who would construct which improvements, and who would pay for obtaining the permits and for constructing the improvements; but most of the disagreements relate to events that occurred *after* issuance of the building permits on May 1, 2017. In addition, certain work was not done properly, which resulted in further delays and increased costs, as well as Landlord's lack of confidence in the work being performed. At various times during the January - October 2017 period, Landlord and Tenant reached compromises on their disagreements; at other times, they could not agree.[4]

E. *June 27, 2017: Landlord's Three-Day Notice to Tenant*

In early May 2017, Tenant's attorney advised Landlord that Tenant's position was that, pursuant to the terms of the Lease, Tenant was not obligated to pay rent until Landlord completed the Landlord's Work. As the month proceeded, the parties' disagreements and disputes escalated with regard to who was responsible for the construction of, and the payment for, which of the improvements to the Premises.

Toward the end of May, according to Tenant, Tenant and one of Landlord's representatives orally agreed to extend the commencement date for payment of rent until the date of Tenant's public opening. Shortly thereafter, Landlord's other representative refused to acknowledge such an agreement. In emails dated May 30, 2017, he demanded

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[4] At trial, each side presented its case in an effort to demonstrate that the other side was responsible for delays and/or nonperformance of contractual obligations related to the improvements. However, very few, if any, of these facts are necessary to our analysis of the issues on appeal—which focuses on *whether Landlord delivered possession*, not on who may have been responsible for delays in delivery of possession.

June rent "on June 1st, per the [L]ease" and asked Tenant to identify the language in the Lease on which Tenant was relying for its position that it was not obligated to pay rent until Landlord completed the Landlord's Work. Later that day, Tenant replied by quoting from paragraphs 2.2 and 3.3 of the Lease and arguing that, based on that language, Tenant was not obligated to pay rent (or perform other obligations) " 'until [Landlord] delivers possession of the Premises.' " At trial, Landlord's representative testified that, in May 2017 when he received Tenant's email, he understood Tenant's position to be: "[Landlord] needed to complete all of Exhibit B [i.e., the Landlord's Work] before [Tenant] was going to pay his rent."

The next day, May 31, 2017, Landlord sent an email to Tenant, in part advising Tenant that June rent was due the following day (June 1). The email advised that Tenant "underst[oo]d the consequences for not paying" and threatened that, if Tenant "continue[d] down these unethical and damaging paths," Landlord's attorney would "serve [Tenant] with a 'Notice to Pay' and all that comes after."

Tenant did not pay June rent, and on June 27, 2017, Landlord issued and served AG Mobile and Gould with a "Three Business Day Notice to Pay Rent or Surrender Possession" (Three-Day Notice). In the Three-Day Notice, Landlord demanded $8,475.50 for Base Rent and related late charges for the period June 1 to July 1, 2017, as

the reasonable estimate of the rent due for purposes of Code of Civil Procedure section 1161.1.[5]

F. *July 2017 - March 2018: Landlord's Unlawful Detainer Lawsuit Against Tenant*

1. *Pretrial Proceedings*

In mid-July 2017, Landlord filed a complaint for unlawful detainer, naming Tenant and Gould as defendants.[6] Landlord sought possession of the Premises, forfeiture of the Lease and, filing the action as a limited civil case, past-due rent of $8,475.50 based on an alleged daily fair rental value of $256.83 for the Premises.

Tenant and Gould answered the complaint, admitting and denying various paragraphs and asserting the affirmative defense of retaliatory eviction.

Landlord filed a motion for summary judgment on the basis that Landlord was entitled to possession of the Premises as a matter of law. Landlord established the existence of the Lease, an extension of the Commencement Date to May 1, 2017, Tenant's occupancy of the Premises, Tenant's last rent payment in May 2017, service of the Three-Day Notice, and Tenant's failure to pay the rent demanded in the Three-Day

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[5] Code of Civil Procedure section 1161, subdivision 2, sets forth what must be shown to establish an unlawful detainer based on a default in the payment of rent, and section 1161.1 deals with the application of section 1161 in cases of possession of commercial real property after default in the payment of rent.

[6] Consistent with the Three-Day Notice, Landlord named and served "AG Mobile Restaurant Concepts, LLC, Alex Gould, aka Alexander Nathan Gould." Neither the evidence at trial nor the parties' arguments on appeal suggest that *Gould*, as opposed to *AG Mobile*, was in possession of the Premises. Consistent with appellants' briefing, our references to "Tenant" are to AG Mobile only.

Notice. Specifically referencing Tenant's position that Tenant did not owe rent until Landlord completed the Landlord's Work, Landlord argued that, as a matter of law, Tenant's obligation to pay rent was independent of any obligation Landlord might owe under the Lease.

Tenant opposed the motion. In part, Tenant contended that a triable issue of fact existed as to whether any rent was due. Consistent with its previous position, Tenant argued: Because Landlord had not completed the Landlord's Work, Landlord had not delivered possession of the Premises to Tenant for purposes of paragraph 3.3 of the Lease; and without delivery of possession for purposes of paragraph 3.3, Tenant was not obligated to pay rent. In support of its position, Tenant provided expert testimony from John Pagliassotti, whom, based on Pagliassotti's curriculum vitae, Tenant described as "a preeminent expert with decades of experience in commercial real estate, [who] is also an author and lecturer on the very forms used by the parties in this case." In brief summary, Pagliassotti's testimony offered the court what Tenant described as expert opinion evidence on the meaning of certain *technical* terms in the Lease—in particular "Commencement Date" and "delivery of possession" as used in paragraph 3.3—to which the language of the Lease was reasonably susceptible. More specifically, Pagliassotti testified:

> "In a case such as this, where the lease requires a landlord to complete certain leasehold improvements necessary for the lawful conduct of a tenant's business, but the landlord was unable to do so, it is usually understood by persons in the commercial real estate business that the landlord has been unable to deliver possession by the Commencement Date in a way that would allow the tenant to operate its business, even assuming the landlord's best efforts to do.

> . . . [U]nder those circumstances, lessors, lessees, and real estate brokers typically recognize that a Lessee is not obligated to pay rent until the Lessor delivers possession of the Leased premises in the condition required by the Lease in order to operate its business."

Following oral argument, the court denied Landlord's motion for summary judgment, ruling in part that the evidence established a triable issue of material fact as to when Landlord delivered possession.

2. *Trial*

The case proceeded as a jury trial[7] in an unlimited civil action.[8] Although the record on appeal does not disclose the factual or legal basis of the reclassification, we

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[7] Of note, paragraph 47 of the Lease provides that the parties "waive their respective rights to trial by jury in any action or proceeding involving the property or arising out of this agreement." (Original in bold upper case letters.)

[8] Claiming in its unlawful detainer complaint that the amount of rent due "exceeds $10,000 but does not exceed $25,000," Landlord filed the action as a limited civil case. (Code Civ. Proc., § 86, subd. (a)(4).) This court does not have jurisdiction to hear appeals in limited civil cases. (*Anchor Marine Repair Co. v. Magnan* (2001) 93 Cal.App.4th 525, 528; Code Civ. Proc., § 904.1, subd. (a).) Landlord did not include in its opening brief the required statement of appealability (Cal. Rules of Court, rule 8.204(a)(2)(A)), and the record on appeal did not contain any indication that the case had been reclassified (Code Civ. Proc., § 403.010 et seq.). In response to the court's request for supplemental briefing on the issue of appellate jurisdiction, both sides agreed that the action had been reclassified and referred the court to the register of actions, which contains the following entry: "Case reclassified from Civil - Limited to Civil - Unlimited on 11/14/2017." The clerk of the superior court failed to include a copy of the register of actions in the clerk's transcript, and Landlord—who, as the appellant, has the burden to provide an adequate record (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295)—failed to notify the clerk of the omission (Cal. Rules of Court, rule 8.155(b)(1)). After receipt of the parties' letter briefs, on our own motion we corrected the record on appeal to include the register of actions as part of the clerk's transcript. (Cal. Rules of Court, rule 8.155(c)(1).)

assume that it was because, by the time of trial in December 2017, Landlord claimed rent in excess of $25,000.

With regard to the principal issue on appeal—namely, Landlord's delivery of possession of the Premises for purposes of commencement of rent—Landlord emphasizes the following evidence at trial in support of its position that it delivered possession of the Premises to Tenant: Landlord's representative gave Tenant keys to the "broom cleaned" Premises in November 2016; and Tenant began its improvements to the Premises in the months preceding the May 1, 2017 extension of the Commencement Date. On appeal, Landlord argues that its only contractual obligation regarding delivery of possession was that, according to paragraph 2.2 of the Lease, the premises be presented "broom clean and free of debris" on the Start Date.

With regard to this same principal issue, Tenant emphasizes the following evidence at trial: Landlord did not complete the Landlord's Work; and based on the custom and practice in the commercial real estate industry, to "deliver possession," the landlord must complete all of *the landlord's improvements required under the specific lease* that are necessary for the tenant to lawfully operate the tenant's business.[9] On

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9 The following is an exchange between Tenant's attorney and Tenant's expert:

"Q. How, if at all, is your opinion affected by the state of completion of the premises; namely, Paragraph 53—I think we showed you before about utilities[—]and/or items on the [L]andlord's [W]ork? How does that come into your opinion, if at all? [¶] . . . [¶]

"THE WITNESS: My opinion is significantly impacted by those items. [¶] . . . [¶]

"Q. Why is that?

"A. Because in terms of delivery of possession, in cases such as

appeal, Tenant argues that the Lease here required, at a minimum, that Landlord complete the Landlord's Work (Lease, ex. B) and provide adequate utilities for Tenant's intended use (Lease, ¶ 53).

The jury was presented with a special verdict form that contained 10 separate questions. The jury answered "No" to the first question, which asked: "Did [Landlord] deliver possession of the Premises to [Tenant]?" Based on the "No" answer, the special verdict instructed the jury to answer no further questions and to have the presiding juror sign and date the form.

Given the jury's factual finding that Landlord had not delivered possession of the Premises to Tenant, the court determined as a matter of law that Landlord was precluded from recovering on its complaint and entered judgment against Landlord and in favor of Tenant in mid-December 2017. (Code Civ. Proc., § 624 ["a special verdict is that by which the jury find the facts only, leaving the judgment to the Court"].)

> this, the custom and practice in the commercial real estate industry is that when the landlord has obligated itself to complete certain improvements to the premises, and the certificate of occupancy is conditioned on those improvements being completed, then possession of premises has not been delivered until the certificate of occupancy is had based on the completion of those improvements. [¶] . . . [¶]
>
> "Q. So you're honing in specifically, if I understand your answer correctly, on things that relate to the ability to lawfully occupy the premises for purposes of doing business. [¶] Is that a fair statement?
>
> "A. Yes, it is."

3. *Postjudgment Proceedings*

As relevant to this appeal, Landlord timely filed a notice of intent to file a motion, and the motion, for judgment notwithstanding the verdict (JNOV) or to set aside the judgment and enter a different one (Code Civ. Proc., §§ 629, 663) and a motion for a new trial (Code Civ. Proc., § 657); and Tenant filed a motion for an award of contract-based prevailing party attorney fees.[10]

Landlord sought the different judgment on the grounds that "there is no substantial evidence to support the jury's verdict that possession of the . . . Premises was not delivered by [Landlord] and that a directed verdict for [Landlord] should have been granted had a previous motion been made." (Code Civ. Proc., §§ 629, 663, subd. (1).) Landlord sought the new trial on these same grounds (Code Civ. Proc., § 657, subd. 6), as well as the various alleged errors of law (Code Civ. Proc., § 657, subd. (7)). .

Following full briefing and oral argument, in a mid-February 2018 minute order, the trial court denied Landlord's motions for JNOV and for a new trial and granted Tenant's motion for attorney fees, awarding $75,000.

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10 During the posttrial proceedings, Landlord also filed an ex parte application "for [an] order setting evidentiary hearing re: potential jury misconduct" and a motion to tax Tenant's memorandum of costs. The court denied the ex parte application and granted in part and denied in part the motion to tax costs.

During the posttrial proceedings, Tenant filed a motion to strike *Landlord's* memorandum of costs (on the basis Landlord was not the prevailing party). The court granted the motion.

There are no issues on appeal as to the postjudgment rulings described in this footnote.

G. *March 2018: Landlord's Appeals*

Landlord separately and timely appealed from both the judgment and the postjudgment order in which the trial court denied Landlord's motions for JNOV and a new trial and granted Tenant's motion for attorney fees. (Cal. Rules of Court, rules 8.104, 8.108(a)-(d).)

II. DISCUSSION

As we introduced at part I., *ante*, Tenant contended and the jury found that Landlord did not deliver possession of the Premises to Tenant. Most of Landlord's arguments are based on its contention, asserted in the trial court and repeated on appeal, that, as a matter of law, Landlord delivered possession of the Premises to Tenant as early as November 2016 but in no event later than May 1, 2017—which required Tenant to pay rent at least as of May 1, 2017. We agree with Landlord.

As we will explain, the Lease is ambiguous by not defining what the parties intended by the clause "deliver[y] of possession of the Premises" when they agreed that "[Tenant] shall not . . . be obligated to pay Rent . . . until [Landlord] *delivers possession of the Premises*[.]" (Italics added.) As we will further explain, because there was no conflict in the extrinsic evidence presented, there was no factual conflict for the jury to resolve; and because there was no factual conflict for the jury to resolve, the court erred by not interpreting the ambiguous language as a matter of law. We need not remand for the trial court to rule in the first instance, however, since our appellate review is de novo, and we too must interpret contracts as a matter of law where the extrinsic evidence is not conflicting.

In independently construing the Lease, we will conclude that Landlord's interpretation is more reasonable and commonsense; for purposes of paragraph 3.3, once Tenant had access to and occupied the "broom clean" Premises—which occurred no later than January 24, 2017—Landlord had delivered possession of the Premises to Tenant for purposes of Tenant's obligation to pay rent under paragraph 3.3. We will remand for the trial court to conduct further proceedings, as appropriate, based on this legal ruling.

A. *Paragraph 3.3 of the Lease Is Ambiguous, Because it is Reasonably Susceptible to More Than One Interpretation*

1. *Background*

In support of its position on the issue of whether it delivered possession of the Premises to Tenant, Landlord relies on a number of well-established authorities for *the general rule* that, in the context of a commercial lease, a tenant in possession of the leased premises must pay rent once it occupies the premises, regardless of their condition. (*Samuels*, *supra*, 169 Cal. at p. 211; *Reynolds*, *supra*, 111 Cal.App.2d at pp. 543-544; *Davis v. Stewart* (1944) 67 Cal.App.2d 415 (*Davis*); *Parkmerced Co. v. San Francisco Rent Stabilization & Arbitration Bd.* (1989) 215 Cal.App.3d 490, 494-495 (*Parkmerced*).) A *corollary to this general* rule is that, although a tenant may have claims against a landlord for failing to provide the demised premises in a condition that enables the tenant to conduct its business (or for breaching most any other covenant), such claims do not relieve the tenant from paying rent or defending against a claim for unlawful detainer based on failure to pay rent. (*Arnold v. Krigbaum* (1915) 169 Cal. 143, 145-146 (*Arnold*); *Frittelli, Inc. v. 350 North Canon Drive, LP* (2011) 202 Cal.App.4th

35, 46 (*Frittelli*) [when landlord impairs tenant's use of the premises, tenant may seek damages, but must continue to pay rent as long as tenant is in possession]; *Schulman v. Vera* (1980) 108 Cal.App.3d 552, 558 (*Schulman*) [breach of landlord's covenant to repair is not a defense to a claim for unlawful detainer based on tenant's failure to pay rent]; *Petroleum Collections Inc. v. Swords* (1975) 48 Cal.App.3d 841, 847 (*Petroleum Collections*) [covenant to pay rent is independent of landlord's obligations other than delivering possession].)

The general rule and its corollary are tempered by *an exception*—namely, the parties' right to contract otherwise. Where the subject lease contains terms and conditions tying the rent obligation to a covenant by the landlord—here, as Tenant argues, Landlord's "deliver[y of] possession of the Premises" irrespective of the Commencement Date—the courts will enforce such agreements, even though they are contrary to the above-described general rule applicable to rent obligations in commercial leases. (*Frittelli, supra*, 202 Cal.App.4th at p. 46 ["*Absent special lease provisions*," the tenant's rent obligation exists once the tenant is in possession and continues so long as the tenant is in possession; italics added]; *Davis, supra*, 67 Cal.App.2d at p. 418 ["*In the absence of an express covenant or stipulation*," the landlord does not have to deliver premises in any particular condition; italics added]; *Strecker v. Barnard* (1952) 109 Cal.App.2d 149, 152 (*Strecker*) [same].) To its credit, Landlord acknowledges this limitation on the general rule, arguing only that it does not apply—and the general rule does—because the Lease in the present action contains no such limitation.

After setting forth certain well-settled rules of contract interpretation, we will examine specific provisions in the Lease and then apply the rules to the parties' agreements in the Lease.

2. *Law*

Civil Code section 1635 provides that "[a]ll contracts, whether public or private, are to be interpreted by the same rules, except as otherwise provided by this Code." California courts consistently have applied this and related maxims to the interpretation of commercial leases. (*Medico-Dental Bldg. Co. of Los Angeles v. Horton & Converse* (1942) 21 Cal.2d 411, 418-419 [commercial leases "should be construed according to the rules for the interpretation of contracts generally and in conformity with the fundamental principle that the intentions of the parties should be given effect as far as possible"]; *Strecker*, *supra*, 109 Cal.App.2d at pp. 152-153.)

These rules provide that a "contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." (Civ. Code, § 1636.) "When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible . . . ." (Civ. Code, § 1639; see *id.*, § 1638 ["The language of a contract is to govern its interpretation, if the language is clear and explicit"].) Although "words of a contract are to be understood in their ordinary and popular sense," where specific words are "used by the parties in a technical sense," the "special meaning [that] is given to them by usage . . . must be followed." (Civ. Code, § 1644.) "If the terms of a promise are in any respect

ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it." (Civ. Code, § 1649.)

Language in a contract is ambiguous if it is reasonably susceptible to more than one interpretation. (*Brown v. Goldstein* (2019) 34 Cal.App.5th 418, 433 (*Brown*).) Because a "contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates" (Civ. Code, § 1647), an ambiguity can be patent, arising from the face of the writing, or latent, based on extrinsic evidence (*Rancho Pauma Mutual Water Co. v. Yuima Municipal Water Dist.* (2015) 239 Cal.App.4th 109, 117; see *Pacific Gas & E. Co. v. G.W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 37-39).

"In cases involving integrated contracts,[11] the use of parol evidence is always subject to the limitation that parol evidence may not be used to vary or contradict the words the parties agreed upon, since an integrated writing must be taken as the best and final expression of their intent. ([Code Civ. Proc.,]§ 1856, subd. (a); Cal. U. Com. Code, § 2202.)" (*Thompson v. Asimos* (2016) 6 Cal.App.5th 970, 987 (*Thompson*).) If we determine there is no ambiguity—i.e., the language is reasonably susceptible to only one interpretation—then the judicial inquiry into meaning is concluded, and the clear and explicit meaning governs. (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254,

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11 The Lease contains language at paragraphs 22 and 46 that suggests the contract is integrated. (See pt. II.A.3., *post*.) Landlord contends the Lease contains an integration clause, and Tenant does not argue otherwise. For purposes of interpreting the disputed language in the Lease, we will assume without deciding that the Lease is integrated.

1264.) If, however, we determine there is an ambiguity, then the judicial inquiry continues by focusing on whether the parties have presented extrinsic evidence relevant to the meaning of the ambiguous language. If there is no extrinsic evidence (or *if there is no conflict in the extrinsic evidence*), then the interpretation of the ambiguity is a question of law; but "where the trial court's interpretation rests on its resolution of conflicting evidence, 'any reasonable construction will be upheld [on appeal] as long as it is supported by substantial evidence.' " (*Thompson,* at p. 987.)

On appeal, we review questions of contract interpretation de novo. (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865-866 (*Parsons*); *Thee Aguila, Inc. v. Century Law Group, LLP* (2019) 37 Cal.App.5th 22, 27.) This includes the determination whether an ambiguity exists. (*Brown, supra*, 34 Cal.App.5th at p. 433; *Thompson*, *supra*, 6 Cal.App.5th at p. 987.)

3. *Language in the Lease*

Paragraph 1.3 of the Lease is entitled "**Term**," and provides for an Original Term of 10 years with a Commencement Date of April 1, 2017, and an Expiration Date of March 31, 2027. Paragraph 54 is entitled "**Rent/Term Commencement**" and provides in full: "The rent and commencement date shall be April 1, 2017." In the Amendment, the parties agreed that "The Expiration Date is hereby . . . extended to May 1, 2017 - April 30, 2027." (See fn. 3, *ante*.)

Paragraph 1.4 is entitled "**Early Possession**" and provides in full: "If the Premises are available, [Tenant] may have non-exclusive possession of the Premises commencing [u]pon release of contingencies ("**Early Possession Date**"). [¶] (See also Paragraphs 3.2

and 3.3.)" The language "[u]pon release of contingencies" is typewritten in a blank in the form; and neither the Lease (in paragraphs 3.2, 3.3, or elsewhere) nor the evidence at trial explains or describes the "contingencies" referred to in paragraph 1.4.

Paragraph 2.2 is entitled "**Condition**" and provides in part that Landlord "shall deliver" the Premises to Tenant "broom clean and free of debris on the Commencement Date or the Early Possession Date, whichever first occurs ('**Start Date**')[.]"

Paragraph 3.2, which is referenced in paragraph 1.4, is also entitled "**Early Possession**." It provides in part that, in the event of Early Possession, "the obligation to pay Base Rent shall be abated for the period of such Early Possession."

Paragraph 3.3 is entitled "**Delay in Possession.**" The language on which the parties' principal dispute is based is found in this paragraph and provides in part: "[Tenant] shall not . . . be obligated to pay Rent . . . until [*Landlord*] *delivers possession of the Premises*[.]" (Italics added.) The parties agree that the Lease does not define, explain, or describe what constitutes *Landlord's delivery of possession of the Premises to Tenant* for purposes of paragraph 3.3.

Paragraph 53 is entitled "**Utilities**" and provides in part that "Landlord shall provide the Premises with adequate utilities required for Tenant's permitted use (including water, sewer, gas[,] electricity, telephone and telecommunications) and shall separately meter to the Premises all such utilities."

Exhibit B is entitled "**EXHIBIT B - Landlord's Work**." The first paragraph of Exhibit B provides in full, "LANDLORD AGREES to complete the following at the Leased Premises ('**Landlord's Work**'): . . . ." After the first paragraph are 10 separately

numbered paragraphs, each entitled with a specific improvement and followed by a description of the particular work to be completed.[12] Although the Lease does not mention Exhibit B and neither the Lease nor Exhibit B contains a date for completion of the Landlord's Work, Landlord acknowledges that it had the responsibility to complete the Landlord's Work.

Paragraph 22 is entitled in part "**No Prior or Other Agreements**," paragraph 46 is entitled "**Amendments**," and portions of these two paragraphs together provide: "This Lease contains all agreements between the Parties with respect to any matter mentioned herein, and no other prior or contemporaneous agreement or understanding shall be effective. . . . [¶] . . . [¶] This Lease may be modified only in writing, signed by the Parties in interest at the time of the modification."

4. *Analysis*

Throughout the proceedings in the trial court—motion for summary judgment, two motions in limine, proposed jury instructions, and postjudgment motions—and now on appeal, Landlord's position has been consistent: Because Tenant had been given keys to clean Premises in November 2016 and, in fact, had been occupying the Premises since then and improving the Premises since shortly after then, Landlord had "deliver[ed] possession of the Premises" to Tenant for purposes of Tenant's rent obligation under paragraph 3.3; and because Landlord had delivered possession of the Premises to Tenant

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12 The 10 paragraphs are entitled: "Storefront"; "Floor"; "Walls"; "Ceiling"; "Bathroom"; "Heating, Ventilating and Air Conditioning"; "Electrical"; "Plumbing"; "Patio"; and "Trash/Recycle/Compost." (Bolding and some capitalization omitted.)

since at least May 1, 2017 (by which time Tenant had begun improvements, received initial building permits, and paid some rent), the Lease required Tenant to pay rent *as a matter of law* regardless of Landlord's alleged breach of other covenants in the Lease.

Throughout the proceedings in the trial court—indeed, before a lawsuit, beginning at least on May 5, 2017 (when Tenant's attorney wrote to Landlord)—and now on appeal, Tenant's contrary position also has been consistent: Under paragraph 3.3 of the Lease, Tenant did not have to pay rent until Landlord delivered possession of the Premises to Tenant; the Lease required Landlord to complete, at a minimum, the Landlord's Work before possession of the Premises could be deemed delivered to Tenant; Landlord had not completed the Landlord's Work at the time Landlord served Tenant with the Three-Day Notice; thus, under paragraph 3.3, Tenant did not owe any rent at the time of the service of the Three-Day Notice.

Once again, the relevant language in paragraph 3.3 of the Lease provides: "[Tenant] shall not . . . be obligated to pay Rent or perform its other obligations *until* [*Landlord*] *delivers possession of the Premises*[.]" (Italics added.)

Landlord's interpretation of paragraph 3.3 is reasonable if "deliver[y of] possession" means providing a key and access to broom-clean Premises regardless of Landlord's other conditions in the Lease. Likewise, Tenant's interpretation is reasonable if "deliver[y of] possession" means providing a key and access to the Premises only after completion, at a minimum, of the Landlord's Work.

Landlord relies on the general rule (i.e., a tenant in physical possession of the leased premises is obligated to pay rent independent of the landlord's other obligations[13]) *as a matter of law*.

Tenant relies on the exception to the general rule (i.e., the parties here contracted otherwise, by agreeing that Tenant's rent obligation is triggered by Landlord's performance of a condition *other than* delivery of physical possession of the premises[14]); and, at trial, Tenant presented extrinsic evidence from Gould and from an expert to support its interpretation of the parties' agreement. In this latter regard, Gould testified that Tenant had not received possession of the Premises for purposes of its rent obligation under paragraph 3.3 "because all of the work on Exhibit B [the Landlord's Work] ha[d] not been concluded." Tenant's expert testified, without objection or a contradictory opinion, that, for Landlord to have "deliver[ed] possession" of the Premises for purposes of paragraph 3.3, Landlord was required to have completed all of *Landlord's improvements required under the Lease* that were necessary for Tenant to lawfully operate its business—including but not limited to completion of the Landlord's Work and compliance with paragraph 53 ("Landlord shall provide the Premises with adequate

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13 *Samuels*, *supra*, 169 Cal. at p. 211; *Reynolds*, *supra*, 111 Cal.App.2d at pp. 543-544; *Davis*, *supra*, 67 Cal.App.2d at p. 418; *Petroleum Collections*, *supra*, 48 Cal.App.3d at p. 847; *Parkmerced*, *supra*, 215 Cal.App.3d at pp. 494-495; see pt. II.A.1., *ante*.

14 *Frittelli*, *supra*, 202 Cal.App.4th at p. 46; *Davis*, *supra*, 67 Cal.App.2d at p. 418; *Strecker*, *supra*, 109 Cal.App.2d at p. 152; see pt. II.A.1., *ante*.

utilities required for Tenant's permitted use . . ."). (See fn. 9, *ante*.) The expert based his opinion on the custom and practice in the commercial real estate leasing industry.[15]

Accordingly, in our de novo review we have no difficulty concluding that, without a definition or description of what the parties meant by referring to the time at which "[Landlord] delivers possession of the Premises" to Tenant in paragraph 3.3, the meaning of "deliver[y of] possession" in paragraph 3.3 is ambiguous. (*Brown, supra*, 34 Cal.App.5th at p. 433 [contract language is ambiguous if it is "susceptible to more than one reasonable interpretation"].)

Having now determined that paragraph 3.3 is ambiguous, we next consider whether the trial court followed proper procedures in construing the ambiguity.

B. *The Trial Court Erred in Allowing the Jury to Interpret the Ambiguous Language*

" 'When there is no material conflict in the extrinsic evidence, the trial court interprets the contract as a matter of law. [Citations.] This is true even when conflicting

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15 "Evidence of custom or standard practice is admissible to interpret the terms of a contract and to imply terms when no contrary intent is apparent from the other terms of the contract. [Citation.] Generally, when there is a custom in a certain industry, those engaged in that industry are deemed to have contracted in reference to that practice unless the contrary appears. [Citation.] The prevailing industry custom binds those engaged in the business even though there is no specific proof that the particular party to the litigation knew of the custom. [Citation.] The industry practice becomes a part of the contract, and the evidence of such custom is admissible to supply a missing term or to aid in interpretation if it does not alter or vary the terms of the contract. [Citation.]" (*Midwest Television, Inc. v. Scott, Lancaster, Mills & Atha, Inc.* (1988) 205 Cal.App.3d 442, 451.) Landlord did not challenge Tenant's expert or his testimony either during the summary judgment proceedings or at trial; thus, we accept it as part of the record on appeal without expressing an opinion regarding its admissibility here, where there is no indication that Tenant was in the commercial leasing business.

inferences may be drawn from the undisputed extrinsic evidence [citations] or that extrinsic evidence renders the contract terms susceptible to more than one reasonable interpretation.' " (*Brown*, *supra*, 34 Cal.App.5th at p. 433, quoting *Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1126-1127 (*Wolf*).)

As we just explained, only Tenant presented extrinsic evidence, and it was not in conflict. Accordingly, the trial court here was required to interpret the ambiguous language as a matter of law. (*Parsons*, *supra*, 62 Cal.2d at p. 866 [where "there is no conflict in the extrinsic evidence . . . we must make an independent determination of the meaning of the contract"]; *Brown*, *supra*, 34 Cal.App.5th at p. 433; *Wolf*, *supra*, 162 Cal.App.4th at pp. 1126-1127.) By delegating this responsibility to the jury, the trial court erred. Accordingly, we will reverse the judgment.[16]

We need not remand for the trial court to rule in the first instance, however. Since appellate courts, like trial courts, are tasked with construing contracts as a matter of law where there is no conflicting extrinsic evidence, we will proceed with interpreting the ambiguous language in the contract at issue here. (*Brown*, *supra*, 34 Cal.App.5th at

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16 In reversing the judgment, Tenant is no longer the prevailing party in the trial court. Thus, we cannot let stand the court's postjudgment order granting Tenant's motion for contract-based prevailing party attorney fees, and we will reverse it as well. (*Gilman v. Dalby* (2009) 176 Cal.App.4th 606, 620 [postjudgment award of contract-based prevailing party attorney fees and costs under Civ. Code, § 1717 reversed because, upon reversal of the judgment, "it no longer can be said that [respondents] are the prevailing parties"]; *Allen v. Smith* (2002) 94 Cal.App.4th 1270, 1284 [" 'An order awarding [attorney fees as] costs falls with a reversal of the judgment on which it is based.' "].) The order as to the other postjudgment motions is moot.

p. 433 ["where . . . the extrinsic evidence is not conflicting, 'the appellate court will independently construe the writing' "].)

C. *In Our De Novo Review, We Conclude That Landlord Presents a More Reasonable and Commonsense Interpretation of the Ambiguous Language Consistent With the Parties' Apparent Intent*

Landlord argues that, for purposes of triggering Tenant's obligation to pay rent, Landlord delivered possession of the Premises to Tenant *as a matter of law*.

Landlord's legal argument is based on the general rule and its corollary that, unless the lease provides otherwise—*and the Lease here does not*, according to Landlord—a commercial tenant must pay rent once it occupies the premises, regardless of their condition. In support of its position, Landlord relies on *Reynolds*, *supra*, 111 Cal.App.2d at pages 542-545; *Parkmerced*, *supra*, 215 Cal.App.3d at pages 494-495; *Samuels*, *supra*, 169 Cal. at page 211; *Petroleum Collections*, *supra*, 48 Cal.App.3d at page 847; *Frittelli*, *supra*, 202 Cal.App.4th at page 46; *Schulman*, *supra*, 108 Cal.App.3d at page 558. Once again, Landlord relies on the following evidence:

- Landlord gave Tenant keys and access to the building in or around November 2016, which was within a few months of executing the Lease (Sept. 2, 2016) and approximately five months before the original Commencement Date of April 1, 2017;
- At that time (Nov. 2016), the Premises were "broom clean"[17]; and

17 Landlord contends that the *only* requirement for delivery of the Premises was Tenant's access to "broom clean" Premises, according to paragraph 2.2 of the Lease. Tenant has never contended that, when Landlord gave Tenant keys and provided access

- Tenant began its improvements to the Premises in the months preceding the May 1, 2017 extension of the Commencement Date.

Tenant does not respond to Landlord's legal argument, other than to suggest that, because of the ambiguity in what the parties meant by "deliver[y of] possession of the Premises" in paragraph 3.3, we must to defer to the jury's factual finding that Landlord did not deliver possession of the Premises to Tenant since the finding is supported by substantial evidence. As we explained at part II.B., *ante*, however, this is not a substantial evidence appeal. Because there was no conflict in the extrinsic evidence, there was no factual dispute to be resolved by the jury; i.e., the interpretation of the ambiguous language was, and is, a matter of law for the court. (*Brown*, *supra*, 34 Cal.App.5th at p. 433.) Thus, we will construe the language, taking into consideration the extrinsic evidence Tenant presented—as, we explained, the trial court should have done in the first instance.

Tenant contends that, for purposes of triggering Tenant's obligation to pay rent, Landlord's delivery of possession of the Premises was contractually delayed until Landlord completed certain improvements to the Premises.

Tenant's legal argument is that the parties may agree that a commercial tenant's rent obligation is triggered by a landlord's performance of conditions *in addition to* delivery of physical possession of the Premises. In this case, Tenant's argument

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to the Premises, Landlord did not comply with the express contractual requirement of paragraph 2.2 that the condition of the Premises be "broom clean."

continues, the parties agreed that, regardless of Tenant's access to or occupancy of the Premises, before Tenant is obligated to pay rent, Landlord must complete the improvements described on the Landlord's Work and paragraph 53 of Lease. In support of its position, Tenant distinguishes Landlord's authorities (cited *ante*) on the basis that, in each of the cases on which Landlord relies, the lease in question did not contain the "various express covenants and stipulations [that] bind[] Landlord" in this case.

In construing the ambiguous language, we are guided by the maxims of contract interpretation set forth at part II.A.2., *ante*, and the reminder that "courts must give a ' "reasonable and commonsense interpretation" ' of a contract consistent with the parties' apparent intent." (*People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2003) 107 Cal.App.4th 516, 526, quoting *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 744; accord, *Department of Forestry & Fire Protection v. Lawrence Livermore National Security, LLC* (2015) 239 Cal.App.4th 1060, 1066.) Under these standards we conclude that the *only* " ' "reasonable and commonsense interpretation" ' " of the ambiguous language—i.e., what the parties intended when they agreed at paragraph 3.3 that Tenant has no rent obligations under the Lease "*until* [*Landlord*] *delivers possession of the Premises*" (italics added)—is that Tenant has no rent obligations under the Lease *until Tenant has access to and occupies the broom-clean Premises*.

We reach this conclusion based on the application of both well-settled law and the facts of this case.

First, we begin with the understanding that a commercial tenant is required as a matter of law to pay rent as of the date " 'the tenant is given a legal right of entry and

enjoyment during the term.' " (*Reynolds*, *supra*, 111 Cal.App.2d at p. 543; see *Samuels*, *supra*, 169 Cal. at p. 211 ["mere occupancy" triggers the rent obligation]; *Davis*, *supra*, 67 Cal.App.2d at p. 418; *Parkmerced*, *supra*, 215 Cal.App.3d at pp. 494-495; see also *Petroleum Collections*, *supra*, 48 Cal.App.3d at p. 847 [tenant's covenant to pay rent is independent of landlord's obligations, other than delivering possession].) We further understand that, despite this general rule applicable to rent obligations in commercial leases, the parties may contract otherwise; i.e., the parties may agree that the tenant's rent obligation is triggered by the landlord's performance of a condition *other than* the tenant's legal right of entry to and enjoyment of the premises. (E.g., *Frittelli*, *supra*, 202 Cal.App.4th at p. 46 ["*Absent special lease provisions*," the tenant's rent obligation exists once the tenant is in possession and continues so long as the tenant is in possession; italics added]; *Davis*, *supra*, 67 Cal.App.2d at p. 418 ["*In the absence of an express covenant or stipulation*," landlord does not have to deliver premises in any particular condition; italics added]; *Strecker*, *supra*, 109 Cal.App.2d at p. 152 [same].)

Here, Landlord gave Tenant keys and access to the "broom clean" Premises in November 2016, and Gould acknowledged that Tenant had "access to do work since the day we signed the [A]mendment"—i.e., January 24, 2017. Here, the Lease does not contain a "special lease provision[]" (*Frittelli*, *supra*, 202 Cal.App.4th at p. 46) or "an express covenant or stipulation" (*Davis*, *supra*, 67 Cal.App.2d at p. 418) that conditioned Tenant's payment of rent on Landlord's completion of the Landlord's Work (Lease, ex. B) or the provision of adequate utilities for Tenant's intended use (Lease, ¶ 53).

Thus, based on the foregoing law and facts, the only *reasonable and commonsense* interpretation of the ambiguous language is that, once Tenant had access to and occupied the Premises—which occurred no later than January 24, 2017—Landlord had delivered possession of the Premises to Tenant for purposes of Tenant's obligation to pay rent under paragraph 3.3.

We next consider whether the extrinsic evidence on which Tenant relies alters the foregoing interpretation. First, Gould testified that Tenant was not obligated to pay rent under paragraph 3.3 until "all of the work on Exhibit B [the Landlord's Work] ha[d] . . . been concluded." In addition, Tenant's expert testified that, for Landlord to have delivered possession of the Premises for purposes of paragraph 3.3, Landlord was required to have first completed all of *Landlord's improvements required under the Lease* that were necessary for Tenant to lawfully operate its business—including but not limited to completion of the Landlord's Work and provision of adequate utilities required for Tenant's permitted use. Significantly, the Lease does not contain any express language or inferences from express language that supports the extrinsic evidence; Gould based his testimony on his understanding of what the Lease provided, and the expert based his testimony on "custom and practice in the commercial real estate industry."

Thus, consideration of this extrinsic evidence does not change our view, as illustrated by the actual facts of the case that went to trial. Here, Tenant had keys and access to clean Premises in November 2016; Tenant began constructing improvements within a few months of receiving the keys and access to the Premises; Tenant received a certificate of occupancy in October 2017; and by the time of the trial in December 2017,

Tenant had been open for business and selling prepared food to the public for more than six weeks. Under these facts, an interpretation that leads to the possible finding that Landlord had not "deliver[ed] possession of the Premises" for purposes of obligating Tenant to pay rent is neither reasonable nor commonsense.[18]

On remand, the trial court is to resolve all remaining issues given the following interpretation of the ambiguous language in paragraph 3.3 based on the evidence presented at trial: Once Tenant had access to and occupied the Premises—which occurred no later than January 24, 2017—Landlord had delivered possession of the Premises to Tenant for purposes of Tenant's obligation to pay rent under paragraph 3.3.[19]

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[18] In so ruling, we express no opinion as to whether Landlord breached any provision of the Lease, since Landlord's breach of other covenants, if any, is beyond the scope of the unlawful detainer proceedings and, accordingly, this appeal. (See *Arnold*, *supra*, 169 Cal. at pp. 145-146; *Frittelli*, *supra*, 202 Cal.App.4th at p. 46 [when landlord impairs tenant's use of the premises, tenant may seek damages, but must continue to pay rent as long as tenant is in possession]; *Schulman*, *supra*, 108 Cal.App.3d at p. 558 [breach of landlord's covenant to repair is not a defense to a claim for unlawful detainer based on tenant's failure to pay rent]; *Petroleum Collections*, *supra*, 48 Cal.App.3d at p. 847 [covenant to pay rent is independent of landlord's obligations other than delivering possession].)

[19] Without knowing exactly what issues will arise, we note that, at a minimum, in its complaint Landlord prayed for: possession of the Premises; costs incurred in the proceeding; past-due rent of $8,475.50; reasonable attorney fees; forfeiture of the Lease; and damages at the daily rate of $256.83 from July 1, 2017, for each day that Tenant remained in possession of the Premises through entry of judgment.

III. DISPOSITION

The judgment and the postjudgment order are each reversed, and the matter is remanded to the trial court to resolve all remaining issues given the interpretation of the ambiguous language set forth in the immediately preceding paragraph. Landlord is entitled to costs on appeal. (Cal. Rules of Court, rule 8.278(a)(2).)

IRION, J.

WE CONCUR:

O'ROURKE, Acting P. J.

DATO, J.